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**IN THE
COURT OF APPEALS OF INDIANA**

LOUISE McCOSKEY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 29A05-0607-CV-386
)	
RANDALL & ROBERTS FUNERAL HOME,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0405-CC-405

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Louise McCoskey appeals a judgment requiring her to pay Randall & Roberts Funeral Home a portion of the funeral and burial expenses for Earl Brown. McCoskey raises two issues, of which we need address only one: whether a statement by the trial court judge would give an objective person, knowledgeable of all the circumstances, a reasonable basis for doubting the judge's impartiality. Because the judge's comments reasonably could be read to suggest his judgment was clouded by his personal knowledge of one of the parties to the contract at issue, we must reverse and remand for a trial before a new judge.

FACTS AND PROCEDURAL HISTORY

Brown died on April 12, 2003, at the home he and McCoskey shared. They had been companions for approximately twenty-three years. On the morning Brown died, McCoskey called Joe Roberts of Randall & Roberts and asked him to take charge of Brown's remains and to conduct the funeral and burial services.¹ When Roberts came to the house to retrieve Brown's remains, Reverend Tom Burton was there with McCoskey, and McCoskey sent clothing with Roberts for Brown to wear in the casket.

Also on April 12, Brown's three adult children, Joanie Doll ("Joanie"), Earl Brown ("Junior"), and Keith Brown ("Keith") met with Roberts and signed a contract with Randall & Roberts for all services related to Brown's funeral and burial. This contract required the payment of interest on unpaid balances and the payment of attorney fees in the event of collection or litigation.

¹ McCoskey previously used the services of Randall & Roberts to bury two husbands and a daughter.

Randall & Roberts conducted Brown's funeral and burial on April 15. Also on April 15, Roberts met with McCoskey and Brown's three adult children² to conclude the business arrangements for Randall & Roberts' services. In the room at the time was Reverend Burton, who was preparing to conduct a funeral service. The Defendants signed a contract making all four of them jointly and severally liable for paying Randall & Roberts for the funeral and burial services. This contract did not include language regarding interest or attorney fees.

The Defendants did not pay the debt to Randall & Roberts. Randall & Roberts filed suit to recover the contract price, interest, and attorney fees. The Defendants denied responsibility. McCoskey also asserted affirmative defenses of duress and undue influence, claiming Roberts forced her to sign the contract on April 15. Prior to trial, Roberts died. At trial, the parties agreed to submit McCoskey's deposition in lieu of live testimony. The court heard testimony from Joanie, Junior, Reverend Burton, and Roberts' son Mark.

After a bench trial, the court entered a judgment that provided in pertinent part:

5. Louise McCoskey, one of the Defendants herein, issued the initial direction that Randall & Roberts Funeral Home be in charge of the funeral and burial of the decedent. That direction was subsequently confirmed by Earl Brown and Keith A. Brown, sons of the decedent and, later, by Joanie Doll, the decedent's daughter.

6. Each of the Defendants agreed to pay Randall & Roberts Funeral Home for services rendered and voluntarily and willingly executed an agreement evidencing or creating such obligation.

7. Joanie Doll, Earl Brown and Keith A. Brown knowingly and voluntarily executed an agreement which obligated them to pay reasonable

² Hereinafter, we refer to McCoskey and the three children collectively as "the Defendants."

attorney fees to Randall & Roberts Funeral Home. Louise McCoskey did not sign this agreement.

8. Plaintiff Randall & Roberts Funeral Home is entitled to and shall recover from the Defendants, jointly and severally, the total sum of Eight Thousand Six Hundred Ninety-Nine Dollars and Fifty-One Cents (\$8,699.51), including accrued interest calculated at the rate of eight percent (8%) per annum from May 15, 2003 through the date of this Judgment.

9. Randall & Roberts Funeral Home shall also be entitled to recover interest at the legal rate from and after the date of this Judgment until paid and costs of this action.

10. Additionally, Randall & Roberts Funeral Home is entitled to recover the sum of Four thousand Five Hundred Dollars (\$4,500.00), representing Plaintiff's attorney fees from Joanie Doll, Earl Brown and Keith A. Brown, jointly and severally.

11. Judgment should be entered against Cross-Claimants Joanie Doll, Earl Brown and Keith Brown on their Cross Complaint against Louise McCoskey.

12. Judgment is entered against Louise McCoskey with regard to any affirmative defenses and claims stated by her.

(App. at 27-28.) McCoskey is the only party that appeals.

DISCUSSION AND DECISION

McCoskey claims a statement by the trial court at the end of the trial suggests she did not receive a fair trial. She requests we reverse this judgment and remand for a trial before an impartial judge. We grant her request.

The statement at issue occurred after closing arguments. Counsel for Randall & Roberts asked if the Court wanted the parties to submit proposed findings and conclusions. The Court replied:

Why don't I just tell you what my findings are and let you submit them. Subject to only reading [th]is 200 page deposition, or a 100 page deposition. I find the following. [Findings and Judgment essentially as set out in paragraphs 5 to 10 of the order quoted above.] Are there questions? Oh, and the Court specifically finds there is no evidence of duress, undue influence, or anything else and *frankly the Court finds the arguments that*

are made to be absolutely beyond comprehension, having known Joe Roberts for 20 some years living in this community. I don't believe it. And I believe the testimony of Reverend Burton and Ms. Doll specifically confirm that. Anything else?

(Tr. at 86) (emphasis added). The 100-page deposition the court still had to read was the testimony of McCoskey, who claimed Roberts forced her, through duress and undue influence, to sign the contract making her liable for Brown's funeral and burial expenses on the day of the funeral.

"A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Indiana Code of Judicial Conduct, Canon 2(A). "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment," Canon 2(B), "[a] judge shall not testify voluntarily as a character witness," *id.*, and a judge "should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 3(E)(1).

The test . . . is whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality. The question is not whether the judge's impartiality is impaired in fact, but whether there exists a reasonable basis for questioning a judge's impartiality. Concerns about public confidence in the judicial system underly [sic] Canon 3. A judge has a duty to promote public confidence in the impartiality of the judiciary.

Tyson v. State, 622 N.E.2d 457, 459 (Ind. 1993) (discussing Canon 3(C)(1), which is now found at 3(E)(1)).

McCoskey's deposition was the only evidence McCoskey presented to support her claim of undue influence and duress, but the trial judge, without reading the deposition,

found no evidence of duress or undue influence. He so found, at least in part, because “frankly . . . the arguments . . . are . . . absolutely beyond comprehension, having known Joe Roberts for 20 some years living in this community.” (Tr. at 86.) Moreover, he specifically found the testimony he had heard supported his personal knowledge and opinion of Joe Roberts. These statements would lead a reasonable person to question the judge’s impartiality because he appears to have reached his decision after hearing only one side of the evidence and while considering extra-judicial knowledge of the character of a dead man who had been a party to the transaction at issue.

It bears repeating that the standard for reversal in this case is not “whether the judge’s impartiality is impaired in fact.” *Tyson*, 622 N.E.2d at 459. Accordingly, we need not, and do determine whether Judge Hughes was impartial. Rather, as required by the standard for reversal, we find only that his comments created a reasonable basis for questioning his impartiality.

Randall & Roberts requests we affirm the trial court’s judgment because it is overwhelmingly supported by the evidence in the record. We acknowledge the evidence could support the judgment reached by this trial court.³ However, that is not the test for whether we must reverse under these circumstances. Because a reasonable person would question this trial judge’s impartiality, we must reverse and remand for a trial before a new judge.

³ We do not intend to imply that a reasonable trier of fact, considering all of the evidence in the record and assessing the credibility of the witnesses who presented testimony, could not have reached a different decision.

Reversed and remanded.

NAJAM, J., and MATHIAS, J., concur.